

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK LOUIS JENDRZEJEWSKI,

Defendant-Appellant.

UNPUBLISHED

December 30, 1997

No. 206465

Gogebic Circuit Court

LC No. 92-000229-FH

ON REMAND

Before: Griffin, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree murder. MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to the mandatory life terms on the murder convictions and to the two-year consecutive term on the felony-firearm conviction. Defendant appealed and we reversed in an unpublished opinion per curiam on April 6, 1995, in docket number 168041. Thereafter, the Supreme Court reversed our decision and remanded for consideration of issues unaddressed in our original opinion. *People v Jendrzejewski*, 455 Mich 495; 566 NW2d 530 (1997).

Defendant's first remaining issue is that the trial court erred in admitting two tape recordings. The first recording was one made by defendant and delivered to his father and the second was from the victim's answering machine, which contained messages left by defendant. Defendant appears to concede that the tapes are relevant. Rather, defendant argues that they are more prejudicial than probative because it was not clearly established when the tapes were made in relation to the murders. We disagree.

First, there was adequate evidence establishing that the tapes were created in relatively close proximity to the killings. The content of the tape to defendant's father indicates that it was made to explain the events to his father. The answering machine tape contained several messages, and defendant acknowledges that at least one of the messages on the tape from him was made the night of the killings. In any event, we believe that any question concerning the relationship in time between the recordings and the killings goes to weight, not admissibility. That is, the jury was capable of ascertaining how

valuable the evidence was in determining whether it established defendant's frame of mind at the time of the killings.

Turning to the issues raised in defendant's supplemental brief in propria persona, defendant first argues that the trial court erred in not suppressing evidence seized from defendant's vehicle before the issuance of a search warrant. Defendant further argues that that search taints the subsequent search conducted under the search warrant. The trial court considered and rejected this argument, as do we.

The trial court's ruling reached two conclusions. First, the trial court concluded that the search of the vehicle before the issuance of the warrant was, at worst, harmless because the only evidence seized was a pair of pants with no evidentiary value. Second, the trial court concluded that neither the search nor the seizure of the vehicle before the issuance of the warrant tainted the search warrant or the search conducted under the warrant. We agree.

First, while the pre-warrant search of the vehicle may have been inappropriate, it was harmless. The only item seized, the pair of pants, had no evidentiary value. Therefore, there is no evidence to suppress even if the search is invalid. Furthermore, that search does not taint the subsequent search warrant. The affidavit in support of the search warrant, with respect to observations of the vehicle itself, only refers to what the police were able to see in plain view through the windows of the vehicle. The affidavit does not rely on any information obtained during the prior search. Therefore, that search could not taint the search warrant.

Defendant argues that the seizure of the vehicle taints the subsequent search under the warrant. We fail to see how it does. First, there is statutory authority to impound the vehicle. MCL 257.252d(1)(e); MSA 9.1952(4)(1)(e) authorizes the police to impound a vehicle if there is reasonable cause to believe that it was used in the commission of a crime or to preserve evidence of a crime. Based upon the observations of the officers of the gun case and wire snips, in plain view through the windows of the vehicle, it was reasonable to believe the vehicle contained evidence of a crime.¹

However, even assuming that the statute unconstitutionally authorizes the impoundment of vehicles in that situation, we fail to see how the impoundment taints the search in the case at bar. The search warrant was based upon information obtained without the impoundment of the vehicle. The police could have put the vehicle under guard until the search warrant was issued—the issuance of the warrant was not dependent upon the impoundment of the vehicle or information learned as a result of impounding the vehicle.

Simply put, even if there were no exigent circumstances to justify application of the “automobile exception” and the police were without constitutional authority to impound the vehicle, their actions did not taint the subsequent issuance of the search warrant. Therefore, there is no reason to suppress the evidence found while executing the search warrant.

Defendant next argues that he was denied a fair trial because he was forced to ingest two psychotropic medications prior to and during trial. To the extent that defendant argues that he was mistreated while in custody by being forced to take medications, that claim is not relevant to this appeal.

The only relevance to this case would be the question whether the medications defendant was taking interfered with his ability to participate in his defense; that is, whether it rendered him incompetent to stand trial. However, this issue was not raised below and, therefore, we decline to consider it now. Indeed, in *People v Lucas*, 393 Mich 522; 227 NW2d 763 (1975), the Supreme Court declined to order a new trial where the defendant had requested a competency hearing, but the trial court failed to comply with the statute or court rule. The Court noted that such failure to comply is not automatic grounds for reversal of the conviction. Rather, the Court noted the defendant was obligated to raise the competency issue in a motion for new trial before raising the issue on appeal. *Id.* at 528-529. Accordingly, defendant was obligated to raise this issue first in the trial court, which he failed to do.

Next, defendant argues that he was denied the effective assistance of counsel. However, defendant has not demonstrated that counsel was ineffective. First, most, if not all, of defendant's complaints deal with trial strategy, to which we give deference to trial counsel's decisions. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Second, the evidence against defendant was strong and we are not persuaded that any alleged mistake by counsel prejudiced defendant—that is, that there was a reasonable probability of defendant's acquittal. *Id.* at 164.

Finally, defendant argues that the trial court erroneously admitted the expert testimony of Detective Kenny from the state police crime lab concerning tool mark, footprint, and shell casing evidence because Detective Kenny's credentials were not properly established. However, defense counsel stipulated to Detective Kenny's expertise in these areas. Defendant complains that counsel was ineffective in doing so, but that represents a matter of trial strategy. Indeed, defendant offers nothing to suggest that Detective Kenny is not an expert or that he could not have been qualified as such. Accordingly, we find this argument to be without merit.

Affirmed.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Janet T. Neff

¹ In his brief, defendant does challenge the conclusion that the items were in plain view. That, however, presents a question of fact to be resolved by the trial court, not this Court. The trial court's conclusions in this regard are not clearly erroneous and, therefore, we will not set them aside.